Supreme Court, U.S.
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CASE NO. _____

SUPREME COURT OF THE UNITED STATES
(October 1996 to October 1997 Term)

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988

Appellant

v.

THE VILLAGE OF SEVILLE, OHIO

Appellee

ON PETITION FOR WRIT OF CERTIORARI TO THE MEDINA COUNTY APPEALS COURT, NINTH JUDICIAL DISTRICT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Jeffrey T. Witschey, Esq., Ohio reg. #0059151 (of record)
Frank J. Witschey, Esq., Ohio reg. #0059171
WITSCHEY & WITSCHEY CO., L.P.A.
CommonWealth Square
300 N. Cleveland-Massillon Road, Suite 14
Akron, Ohio 44333
(330) 665-5117
Fax No. (330) 665-7615
COUNSEL FOR APPELLANT, STANLEY D. SCHEETZ, TRUSTEE

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QUESTION PRESENTED FOR REVIEW

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "taking" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

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3. Stanley Scheetz, Trustee v. Village of Seville, Ohio Decision and Journal Entry dated August 21, 1996, filed in the Medina County Court of Appeals, Ninth Judicial District, Case No. 2482-M, unreported.

4. Stanley Scheetz, Trustee v. Village of Seville, Ohio Entry filed January 15, 1997 in the Supreme Court of Ohio, Case No. 96-224. Stanley Scheetz, Trustee v. Village of Seville, Ohio, 77 Ohio St. 3d 1516, 674 N.E. 2d 370 (1994).

CONCISE STATEMENT OF JURISDICTIONAL BASIS

The order sought to be appealed from is the Supreme Court of Ohio's Entry filed January 15, 1997, denying jurisdiction to hear the case and dismissing the appeal as not involving any substantial constitutional question. The last order ruling on the merits of the case was the Stanley Scheetz, Trustee v. Village of Seville, Ohio, Decisions and Journal Entry dated August 21, 1996, filed in the Medina County Court of Appeals, Ninth Judicial District, Case No. 2482-M, unreported. There is no order respecting rehearing or granting an extension of time to file this Petition for a *Writ of Certiorari*.

STATUTORY PROVISIONS CONFERRING JURISDICTION TO THE U.S. SUPREME COURT TO REVIEW THE ORDER IN QUESTION

1. Rule 10(a)(b) and (c) of the U.S. Supreme Court Rules.

2. Fifth Amendment to the U.S. Constitution.

3. Fourteenth Amendment to the U.S. Constitution.

4. Article VI Clause 2 of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC. INVOLVED IN THE INSTANT CASE AND SET OUT VERBATIM

1. United States Constitution Article VI Clause 2 Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. United States Constitution Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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I. STATEMENT OF FACTS

Stanley Scheetz, Trustee of the Seville Corporate Park Subdivision Trust (Mr. Scheetz) is the owner of certain undeveloped land (Undeveloped Land) in the Village of Seville, Ohio (Appellee). The Undeveloped Land was zoned commercial according to the Defendant's then applicable zoning code.[1] Mr. Scheetz, relying on the broad range of uses allowed by the commercial zoning of the Undeveloped Land purchased the Undeveloped Land on December 1, 1988 for $275,000. Mr. Scheetz then platted the Undeveloped Land and immediately began marketing the property for sale as commercial property and investing money in infrastructure improvements such as streets, waterlines and sewers capable of handling a broad range of commercial uses.[2]

On January 1, 1990, Appellee enacted a new zoning ordinance (Zoning Ordinance). Just prior to its enactment, a village council member added language for a new zoning district into the Zoning Ordinance entitled "Highway Service Commercial District" (HSCD).[3] However, no change or amendment was made to the zoning district map (Zoning District Map) which designated the land to be

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[1] This commercial zoning broadly allowed all commercial uses.

[2] As of trial, Mr. Scheetz had invested approximately $648,000 in infrastructure improvements and interest. Mr. Scheetz' engineers estimated another $350,000 to complete the road improvements.

[3] The language of the HSCD section strictly limited the use of potential HSCD land to the following permitted uses: (a) gasoline filling stations; (b) garage and automotive repair shops (c) restaurants and eating places; (d) motels; (e) signs; (f) parking and loading; and (g) accessory uses clearly incidental to the above uses. These uses will be referred to herein as "Highway Service Uses".

included in each of the various zoning districts. Mr. Scheetz' Undeveloped Land remained commercial. In 1992 the Zoning District Map was physically changed at the insistence of one village council member to change the zoning of the Undeveloped Land from commercial to HSCD. However, this change occurred without notice, without public discussion or debate and without official action or vote by Apellee's planning commission or council.

Except for a lot sold to Hardee's Restaurants (Lot No. 763), Mr. Scheetz has been unable to sell any of the remaining Undeveloped Land in an arm's length transaction for any Highway Service Uses and has not been able to use the remainder of the Undeveloped Property for any economically viable use. Mr. Scheetz attempted to market, sell or use the Undeveloped Property for Highway Service Uses, but was unable to do so. Mr. Scheetz attempted to obtain zoning amendments allowing commercial uses that he once had, but was denied. Additionally, he tried to obtain multifamily uses by amendments to the Zoning Ordinance, but was again denied. Because of the overly restrictive HSCD Zoning applied to the Undeveloped Land without proper legislative action, Mr. Scheetz has been unable to recover his investment in the property.

On November 29, 1993, Mr. Scheetz filed his Complaint for Declaratory Judgment and Money Damages for the unconstitutional regulatory "taking" of his property under the Ohio and United States Constitutions. On September 6, 1994, Mr. Scheetz filed his Amended Complaint requesting the Trial Court issue its Declartory Judgment that the Zoning Ordinance is unconstitutional and unlawful in general and as it is applied to the Undeveloped Land under both the Ohio and United States Constitutions. Mr. Scheetz filed a motion for Summary Judgment on

October 25, 1994. In his Motion for Summary Judgment Mr. Scheetz argued on pages 10 and 11 that the Trial Court apply the two part federal disjunctive test as this Court set forth in *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106, (1980) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L. Ed. 2d 798, (1992). Appellee filed a Counter Motion for Summary Judgment and argued that the conjunctive test set forth by the Ohio Supreme Court in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638, N.E.2d 533 (1994) should be applied instead of the federal test. In his Memorandum in Opposition Mr. Scheetz again argued on pages 3 and 4 as follows:

> Mr. Scheetz' argument is that the Zoning Ordinance violated the Ohio Constitution as applied to the Undeveloped Property because the Highway Service Uses are not economically viable **and** do not advance a ligitament governmental interest. *Gerijo, Inc. v. Fairfield,* 70 Ohio St. 3d 223. The Zoning Ordinance further violates the U.S. Constitution because the Highway Service Uses are not economically viable **or** do not advance a ligitament government interest. *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106.

The Trial Court denied Mr. Scheetz' Motion for Summary Judgment and Appellees Motion for Summary Judgment since material factual issues existed. See Findings and Order marked as Exhibit A of the Appendix. The Trial Court then conducted a bench trial held on June 6 through June 9 and July 5, 1995. The pleaded declaratory judgment claims and

a procedural due process issue concerning the unadopted zoning district map were tried.[4]

At trial, counsel for Mr. Scheetz argued that the trial court apply this honorable Court's holdings in *Lucas*, 505 U.S. 1003, and *Agins*, 447 U.S. 255. See pages 561, 580, 581 of the Trial Court transcript marked as Exhibit E to the Appendix.

On September 12, 1995, the Trial Court filed its final Findings and Order in favor of Appellee. The Trial Court failed to apply the *Lucus* and *Agins* decisions and instead applied the conflicting law pronounced in the majority opinions of the Ohio Supreme Court cases of *Gerijo, Inc.*, 70 Ohio St. 3d 223, 638 N.E.2d 533 and *Central Motors Corporation v. City of Pepperpike*, 73 Ohio St. 3d 581, 653 N.E.2d 639 (1995). See Findings and Order Marked as Exhibit B to the Appendix.

On September 21, 1995 Mr. Scheetz filed his appeal with the Medina County Appeals Court. Mr.

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[4] The Zoning Ordinance was adopted in December of 1989, but the Undeveloped Land remained in the regular commercial zoning district according to the then existing zoning district map. The zoning district map which classified Mr. Scheetz' Undeveloped Land as HSCD property was not drafted until 1992. This zoning district map was never voted upon or enacted with legislation. This suit was brought in November of 1993 approximately one year after the new zoning district map was first created and Mr. Scheetz first discovered the change of zoning on the Undeveloped Property. The trial court failed to rule on the due process issues apparently refusing to apply Ohio's "discovery rule" to Ohio's 2 year statute of limitations regarding procedural deficiencies in the enactment of zoning ordinances and apparently held that the procedural violation occurred in December of 1989 when the Zoning Ordinance adding the HSCD language was enacted without an updated map. The procedural due process issue was therefore held to have been barred by the applicable statute of limitations.

Scheetz argued in his appeal brief that the Trial Court erred since it was bound to follow the U.S. Supreme Court decisions which provided more constitutional protection to Mr. Scheetz than the *Gerijo* and *Central Motors* cases. See pages 8-10 of Brief of Plaintiff-Appellant marked as Exhibit F to the Appendix. The Appellee responded by arguing that the Trial Court correctly applied the *Gerijo* and *Central Motors* cases instead of *Lucas* and the Fifth Amendment to U.S. Constitution because *Lucas* and the Fifth Amendment of the U.S. Constitution only provide for a remedy in cases where there is a "complete taking". In Mr. Scheetz' Brief in Reply, Mr. Scheetz argued that this position was void of merit because:

> (1) The outcome of the court's determination under the Federal standard is not the issue on this appeal. This appeal only concerns whether the Federal disjunctive test should have been used to determine the outcome; (2) *Lucas* and the instant case are in no way distinguishable since both concern a regulatory taking that left the owner's lands economically idle; (3) In neither Central Motors nor Gerijo do the majority opinions address the obvious conflict between Ohio's conjunctive test and the Federal disjunctive test; (4) In determining a "complete taking" of property has occurred, the Federal decisions require the court to consider the property owner's "investment backed expectations." Lucas at 2903, see e.g. Kaiser Aetna v. United States (1979), 444 U. S. 164, 175. This factor clearly weighs in Mr. Scheetz'

> favor yet the Trial Court failed to consider it; and (5) **Lucas and the Fifth Amendment to the U.S. Constitution apply to all takings cases!** Mr. Scheetz has asserted the same in his case throughout the pleading, discovery and trial stages.[5] See Pages 3 and 4 of Mr. Scheetz' Reply Brief, marked as Exhibit G to the Appendix.

On August 21, 1996 the Medina County Appeals court denied Mr. Scheetz' appeal on the basis that it was bound to follow Ohio Supreme Court Law instead of U.S. Supreme Court Law. The Medina County Appeals Court stated on pages 3 and 4 of its opinion:

> Rather than following the Ohio Supreme Court's conjunctive tests, requiring a challenger to prove both elements, Scheetz asks us to follow the federal disjunctive test, which would require him to prove only one element or the other. See *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 65 L.Ed. 2d 106, 112. This position, that Ohio Courts should employ a conjunctive test, was taken by the concurring and dissenting opinions in *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St. 3d 581, 588-590 (*Wright*, J., concurring in judgment only), 590 (Pfeifer, J., dissenting).

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[5] See, also, part IV of Mr. Scheetz' Reply Brief marked as Exhibit G to the Appendix.

> The majority opinion in *Central Motors*, however, reaffirmed that the appropriate test in Ohio is the conjunctive test set forth in the syllabus of *Gerijo, Id.* at 584. We are bound to follow the syllabus law of the Ohio Supreme Court and have no jurisdiction to reverse or modify it. *Love v. Motorist Mut. Ins. Co.* (1993), 86 Ohio App. 3d 394, 400; *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App. 2d, 17, 21. Therefore, the Trial Court did not err in applying the *Gerijo* conjunctive test. The first assignment of error is overruled. See Decision and Journal of the Medina County Court of Appeals marked as Exhibit C to the Appendix.

On October 4, 1996, Mr. Scheetz filed his petition for *Certiorari* with the Ohio Supreme Court. Mr. Scheetz again argued that the trial court, was bound by the Supremacy Clause of the U. S. Constitution to apply this honorable Court's decisions instead of the lesser protections afforded in *Gerijo* and *Central Motors*. See Memorandum In Support of Jurisdiction of Appellant, Stanley D. Scheetz, Trustee (filed with the Ohio Supreme Court), marked as Exhibit H to the Appendix. The Ohio Supreme Court filed its order on January 15, 1997 denying jurisdiction to hear the case and dismissing the appeal as not involving a substantial constitutional question.[6] See Entry of the Supreme Court of Ohio

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[6] It is unclear how the Ohio State Supreme Court could have dismissed the appeal as not involving a substantial constitutional question. Since it rendered no opinion, this question remains unanswered.

Denying Certiorari marked as Exhibit D to the Appendix.

II. QUESTION PRESENTED FOR REVIEW:

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "takings" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

A. The Medina County Common Pleas Court, the Medina County Court of Appeals, and the Ohio Supreme Court have decided an important constitutional question in a way that conflicts with relevant decisions of the U.S. Supreme Court.

The Medina County Appeals Court in the instant case upheld the Trial Court's application of the Ohio Supreme Court's recent holdings in *Gerijo* and *Central Motors* since it stated that it was bound to follow Ohio Supreme Court precedent instead of United States Supreme Court precedent. In *Gerijo* and *Central Motors* the Ohio Supreme Court has decided an important federal question in a way that conflicts with relevant and binding decisions of this honorable Court.

In the instant case Mr. Scheetz alleged in his complaint and argued throughout the course of trial that the actions of the Appellee constituted an unconstitutional "taking" of Mr. Scheetz' property under the Ohio Constitution **and** the Fifth

Amendment to the United States Constitution. There is a substantial difference in the constitutional protection afforded under each of these constitutions. The Fifth Amendment of the United States constitution states in pertinent part: "***nor shall private property be taken for public use, without just compensation." This honorable Court, in interpreting and applying this portion of the Fifth Amendment of the U.S. Constitution, has offered substantially more protection to property owners regarding "regulatory takings" cases than the Ohio Supreme Court has afforded property owners under the Ohio Constitution in its *Gerijo* and *Central Motors* cases. Because of *Gerijo* and *Central Motors*, Ohio real property owners, such as Mr. Scheetz, are not afforded the benefits of their U.S. Constitutional rights as pronounced by this Court in cases such as *Lucas* and *Agins*.

In *Gerijo* and *Central Motors* the Ohio Supreme Court applied a **conjunctive** two part analysis to decide the constitutional validity of zoning regulations in Ohio. This two prong analysis requires the landowner alleging the "taking" to show that the zoning classification denies his or her property of its economic viability **and** does so without advancing legitament government interests. *Gerijo*, 70 Ohio St. at 228, 638 N.E.2d 533 and *Central Motors*, 73 Ohio St. at 584, 653 N.E.2d 639.[7]

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[7] Additionally, under Ohio's conjunctive test, Ohio property owners are saddled with the burden of proving both elements "beyond fair debate." *Gerijo* at 229 and *Central Motors* at 584. The Ohio Supreme Court has equated the "beyond a fair debate" standard with the "beyond a reasonable doubt" standard applied in criminal cases. The *Central Motors* Court stated on page 584 that:

> ***the party attacking the regulation must establish, beyond fair debate, that the zoning classification denies the owner an

Contrary to these decisions, this honorable Court has held that a two part **disjunctive** test be applied in analyzing a taking under the U. S. Constitution. In other words, the regulation violates the U. S. Constitution if it denies the property owner an economically viable use of the land **or** it does not substantially advance a legitament government interest. *Agins*, 447 U.S. at 260 and, *Lucas*, 505 U.S. at 1016.

As part of the disjunctive test this honorable Court has also provided additional protection for the property owner by requiring the trial court consider the landowner's "investment backed expectations" in deciding whether the regulated property has been deprived of its economic viability. *Id. at* 1034, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct.

> economically viable use of the zoned property, and that the zoning classification fails to advance a legitimate governmental interest. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St. 3d 223, 638 N.E. 2d 533, Syllabus. This Court has stated that **there is little difference between the "beyond fair debate" standard, and the "beyond a reasonable doubt" standard**. (emphasis added).

Ohio property owners must therefore prove their constitutional rights by a criminal standard. There is no indication in any federal case law that property owners must prove their constitutional rights regarding the disjunctive federal test by a criminal standard. Although *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303, 311, (1926) indicates that a "beyond a fair debate" test is used, this honorable Court has not likened this burden of proof to the high burden of proof used in criminal cases. Again, the Ohio Supreme Court has provided its property owners less constitutional protection than is afforded to them under the U.S. Constitution and this honorable Court's holdings concerning the same.

383, 390, 62 L. Ed. 2d 332 (1979), *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978). The *Gerijo* and *Central Motors* decisions fail to instruct trial courts in Ohio to considered the landowner's "investment backed expectations" in considering the economic viability prong of its test. Mr. Scheetz did not receive the benefit of this part of this Court's disjunctive federal test.

B. Application of the *Gerijo* and *Central Motors* holdings to the instant case offends, ignores, and undermines the basic principals of U.S. federal law preemption and U.S. Constitution supremacy thereby depriving Ohio property owners of their rights guaranteed by the U.S. Constitution.

The Takings Clause of the Fifth Amendment of the United States Constitution is applicable to the states through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897). Additionally the Supremacy Clause of the U.S. Constitution Article VI Clause 2 states as follows:

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary**

notwithstanding. (emphasis and underlining added).

The Ohio Supreme Court holdings in *Gerijo* and *Central Motors* and their application to the instant case offend the Supremacy Clause of the U.S. Constitution and well established holdings of this honorable Court concerning the supremacy of U. S. Federal law which were accurately noted by the Ohio Supreme Court itself in *Society National Bank v. Kienzle*, 11 Ohio App. 3d 178, 180-81, 463 N.E.2d 1261, 1264, (1983):

> **The Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution.** Their obligations is "*** imperative upon the state judges in their official, and not merely in private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. **They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States - - 'the supreme law of the land'"** *Martin v. Hunter's Lessee* (1816), 14 U.S. (1 Wheat) 304, at 340-341, 4 L. Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967. **State courts have both the power and duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction.** *Claflin v. Houseman*

> (1876), 93 U.S. 130, 23 L.Ed. 833; *Testa v. Katt* (1947), 330 U.S. 386, 67 S. Ct. 810 91 L.Ed. 967. **State courts are bound then to give effect to federal law when it is applicable, and to disregard state law when there is a conflict.** *Gibbons v. Ogden* (1824), 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23; *Hines v. Davidowitz* (1941), 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581. (emphasis and underlining added).

Preemption occurs when state regulation conflicts with or is incompatible with Federal law. *Fidelity Federal Savings & Loan Association v. DeLaCuesta*, 458 U. S. 141, 152-153, 102 S. Ct. 3014, 3022, (1982). Because *Lucas, Agins, Kaiser,* and *Penn Central* provide the property owner with more constitutional protection than is afforded by the Ohio Supreme Court's decisions in *Gerijo* and *Central Motors,* the U. S. Constitution and this honorable Court's decisions should preempt the conflicting lesser protections given by the Ohio Supreme Court. The Ohio Supreme Court, itself, in *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 42, 616 N.E.2d 163, 169, (1993) stated:

> In the areas of individual rights and civil liberties, **the United States Constitution, where applicable to the state, provides a floor below which state court decisions may not fall.** (emphasis added).

The Ohio Supreme Court further stated in *Arnold*: "****** states may not deny individuals or groups the minimum of protection mandated by the Federal Constitution**". *Id.* at 42, 616 N.E.2d at 169.

(emphasis added). The Ohio Supreme Court's recent holdings in *Gerijo* and *Central Motors* conflict with relevant decisions of this honorable Court. These holdings therefore, violate the fundamental preemption rules and mandates of the Supremacy Clause that the U. S. Supreme Court and the Ohio Supreme Court itself, in *Arnold,* have articulated.

It should be noted by this honorable Court that Justices Pfeifer, Wright and A. William Sweeney of the Ohio Supreme Court joined a dissenting opinion in *Gerijo* arguing in favor of this honorable Court's disjunctive test. *Gerijo* at 231, 638 N.E.2d at 539.[8] In *Central Motors*, Justice Wright, concurring in judgment only, correctly explained why the federal disjunctive test should apply:

> "Although states may afford individuals greater rights than those afforded under the Federal Constitution, **states can not deprive individuals of rights that are guaranteed by the Federal Constitution. Because the majority's conjunctive test does not provide individuals with the full protection afforded by the Federal**

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[8]One leading Ohio commentator has recently suggested: **" The dissenters in *Gerijo* are clearly correct**. While the majority may be forgiven for not citing *Agins*, ***** its total disregard of *Lucas* is incomprehensible*****. *Gerijo* is a 4 to 3 decision, so perhaps the Court [the Ohio Supreme Court] will find an opportunity to change its opinion." Meek, Stuart, and Pearlman, Kenneth, *Ohio Planning and Zoning Law*, Banks-Baldwin Law Publishing Company, 1995-96 Edition, page 335. (emphasis added). The instant case gave the Ohio Supreme Court that opportunity, but instead, it denied certiorari. It is now clear that the only way this injustice can be remedied is through action of this honorable Court.

> **Constitution it is, itself, unconstitutional. When reviewing the constitutionality of the zoning ordinance this court should abandon the conjunctive test and follow the proper legal standards under the takings clause and or due process clause, as articulated by the United States Supreme Court.** *Central Motors* at 589, 590 (Justice Wright concurring in judgment only). (emphasis and underlining added)

The *Gerijo* and *Central Motors* cases have widespread and substantial constitutional ramifications since they conflict with this honorable Court's decisions and deprive Ohio property owners of their U.S. Constitutional rights.[9]

III. CONCLUSION

In the instance case the Medina County Common Pleas Court, the Medina County Appeals Court, and the Ohio State Supreme Court have applied and upheld a rule of law which conflicts with relevant decisions of this honorable Court. These lower courts did not misapply a properly stated rule of law, but instead applied an improper rule of law that conflicts with relevant decisions of this honorable Court. The Federal disjunctive test along with its

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[9] It is unclear why the Ohio State Supreme Court (after demonstrating a clear understanding and willingness to follow Federal law supremacy and preemption mandates in *Arnold*) has abandoned all notions of Federal law supremacy and preemption in its regulatory "takings" cases. Although the dissenters in *Gerijo* and *Central Motors* have correctly articulated Federal law supremacy and preemption concepts, the members of the majority have not explained themselves. Their opinions are silent as to the preemption and supremacy issues.

requirements to consider the landowner's "investment backed expectations" and its "fairly debatable" burden of proof test should have been, but were not, applied to Mr. Scheetz' claim for an unconstitutional "regulatory taking" without compensation. For the foregoing reasons each of these issues should be considered by this Court and *Certiorari* should be granted.

Respectfully Submitted,

Jeffrey T. Witschey, Esq.,#0059151 (of record)
Frank J. Witschey, Esq.,#0059171
WITSCHEY & WITSCHEY CO., L.P.A.
CommonWealth Square
300 N. Cleveland-Massillon Rd., Suite 14
Akron, Ohio 44333
(330) 665-5117
ATTORNEYS FOR
APPELLANT

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